



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
CIVIL RIGHTS

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In Reply Refer to:

EPA OCR File Nos. 03R-03-R9 /
02R-02-R9

Henry R. Darwin
Director
Arizona Department of Environmental Quality
1110 West Washington Street
Phoenix, Arizona 85007

Re: DISMISSAL OF TITLE VI ADMINISTRATIVE COMPLAINTS

Dear Director Darwin:

The purpose of this letter is twofold to: 1) notify the Arizona Department of Environmental Quality (ADEQ) that the U.S. Environmental Protection Agency (EPA), Office of Civil Rights (OCR) is dismissing the intentional discrimination claim, as well as; 2) notify ADEQ that the OCR is dismissing the discriminatory effects claim from the administrative complaints filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964, as amended,¹ (Title VI) by Don't Waste Arizona (DWAZ or Complainant) against ADEQ. DWAZ filed two administrative complaints with OCR dated January 28, 2002, (02R-02-R9) and July 21, 2003 (03R-03-R9), respectively. The two complaints met EPA's four jurisdictional requirements as found in 40 C.F.R. Part 7. 02R-02-R9 was accepted on August 20, 2002, but was subsequently consolidated into a single investigation with 03R-03-R9 upon its acceptance on October 7, 2005.

The general allegation at issue in this letter is that ADEQ intentionally violated Title VI and EPA's regulations implementing Title VI by failing to provide an effective complaint mechanism for Latinos living in Hayden and Winkelman, Arizona, to report noncompliance of alleged Title V air permit violations at the ASARCO-Hayden smelter, even after ADEQ had notice that its telephone hotline complaint mechanism was inadequate.² Complainants further allege that ADEQ's failure to provide an effective complaint mechanism or rectify the alleged

¹ 42 U.S.C. §§ 2000d *et seq.*

² Acceptance of Administrative Complaint from United States Environmental Protection Agency, Office of Civil Rights (USEPA OCR) to Stephen Brittle, President, Don't Waste Arizona (DWAZ) (August 20, 2002), and Acceptance of Administrative Complaint from United States Environmental Protection Agency, Office of Civil Rights (USEPA OCR) to Stephen Brittle, President, Don't Waste Arizona (DWAZ) (October 7, 2005) (on file with US EPA OCR).

problems complained of has resulted in discriminatory effects on Latino residents in Hayden and Winkelman.³

Following its investigation, OCR finds no violations of EPA's Title VI regulations and concludes that the facts do not substantiate the Complainants' allegations. Therefore, the Complainants' original allegations regarding ADEQ's intentional discrimination and discriminatory effects are hereby dismissed.

I. ALLEGATIONS

As both complaints were filed by the same group on behalf of the same community and concern the same facility, the two complaints (02R-02-R9 and 03R-03-R9) were consolidated on October 7, 2005, into a single investigation.

The complaints generally allege that ADEQ intentionally violated Title VI and EPA's regulations implementing Title VI by failing to provide an effective complaint mechanism for Latinos living in Hayden and Winkelman, Arizona, to report noncompliance of alleged Title V air permit violations at the ASARCO-Hayden smelter, even after ADEQ had notice that its telephone hotline complaint mechanism was inadequate.⁴ Specifically, DWAZ asserts that the hotline provides no way to leave a message or complaint about problems at the facility during evenings, weekends, or holidays. DWAZ also asserts that when Latino residents have called the hotline during business hours, either no one at ADEQ has been able to take their calls, or no ADEQ official receiving the call has been qualified to address their concerns.⁵ Complainants' second allegation is that ADEQ's failure to provide an effective complaint mechanism in the telephone hotline has resulted in discriminatory effects on Latino residents in Hayden and Winkelman.⁶ DWAZ alleges that Hayden and Winkelman are 90% Latino, and the discriminatory effects complained of include air pollution and adverse health consequences associated with smoke and particulate matter emitted from the nearby ASARCO-Hayden smelter.⁷

DWAZ cites the following examples of incidents to support its claims: "On December 3, 2001 ... a DWA[Z] member, ... contacted ADEQ via th[e] hotline to attempt to report excess daytime smoke and emissions from the Hayden-ASARCO smelter, but was not able to reach anyone at the agency."⁸

³ Acceptance of Administrative Complaint from United States Environmental Protection Agency, Office of Civil Rights (USEPA OCR) to Stephen Brittle, President, Don't Waste Arizona (DWAZ) (August 20, 2002).

⁴ US EPA OCR, *supra* note 2 at 1.

⁵ Administrative Complaint from Stephen Brittle, President, DWAZ to USEPA OCR (January 28, 2002), and Administrative Complaint from Stephen Brittle, President, DWAZ to USEPA OCR (July 23, 2003) (on file with US EPA OCR).

⁶ Acceptance of Administrative Complaint from United States Environmental Protection Agency, Office of Civil Rights (USEPA OCR) to Stephen Brittle, President, Don't Waste Arizona (DWAZ) (August 20, 2002).

⁷ *Id.*

⁸ Administrative Complaint from Stephen Brittle, President, DWAZ to USEPA OCR (January 28, 2002) (on file

“In January 2002, [the same DWAZ member] contacted ADEQ via the[e] hotline to attempt to report that sulfuric acid mist [was] emitted from the ASARCO smelter...” and “was informed that all ‘qualified staff’ were gone for the day.”⁹

“On July 8, 2003, a DWA[Z] member tried repeatedly to complain to ADEQ about air pollution caused by the operations of the ASARCO smelter operation, as well as blowing dust from the tailings piles surrounding the towns.” DWAZ also asserts that instead of taking the caller’s complaint and investigating, the ADEQ representative instead made excuses and defended the industry’s economic contribution - as the towns’ major employer.¹⁰

“On July 17, 2003, a DWA[Z] member tried to contact ADEQ to file a complaint about suspected Carbon Monoxide NAAQG [sic] NAAQS [National Ambient Air Quality Standards] exceedances. ... The DWA[Z] member was unable to reach anyone at ADEQ during normal business hours to file a complaint about this. ... DWA[Z] staff then also tried unsuccessfully, during business hours on Thursday, July 17, 2003, to reach someone at the ADEQ Air Quality Division to file a complaint.”¹¹ DWAZ asserts “[c]learly the ADEQ has failed to provide a reliable mechanism for ... ethnic minority people living in rural... areas ... to report environmental concerns and noncompliance regarding these facilities.” DWAZ asserts that “ADEQ has certainly been adequately notified of this problem. The failure to rectify this problem with the hotline ... must be assumed to be deliberate and intentional, and not an aberration.”¹² Therefore, DWAZ asserts “[w]ith [ADEQ] aware of the allegations of on-going civil rights violations, and with [ADEQ] not taking any actions ... it would appear the civil rights violations alleged in this complaint are *intentional*, knowing violations.”¹³

II. POSITION STATEMENT FROM THE RECIPIENT

In its response to the complaint, ADEQ denied that it violated Title VI of the Civil Rights Act of 1964 or EPA’s nondiscrimination regulations of 40 C.F.R. § 7.10 *et seq.* or that the agency failed to provide an effective means for rural Arizonans, including Latinos, to report complaints to ADEQ via an effective complaint mechanism.¹⁴ Accordingly, ADEQ also denied that their alleged failure to provide an effective complaint mechanism resulted in discriminatory effects for Latino residents in Hayden and Winkelman.¹⁵

with US EPA OCR).

⁹ *Id.* at 2.

¹⁰ Administrative Complaint from Stephen Brittle, President, DWAZ to USEPA OCR (July 23, 2003) (on file with US EPA OCR).

¹¹ *Id.* at 3.

¹² *Id.* at 5.

¹³ *Id.* at 2.

¹⁴ Letter with Attachments from Bret Parke, Administrative Counsel, Arizona Department of Environmental Quality (ADEQ) to Helena Wooden-Aguilar, Assistant Director, US EPA OCR (August 5, 2010) (on file with US EPA OCR).

¹⁵ *Id.*

To support its position that it did not intentionally discriminate, ADEQ states that it “did not intentionally fail to provide an effective complaint mechanism for Latinos living in Hayden and Winkelman because ADEQ provides various means for residents to file complaints where there is no immediate threat to human health or the environment, including a toll-free, dual-language complaint hotline and allowing citizens to file complaints online.”¹⁶ ADEQ explains that it is not a first responder and that in the event of an emergency, residents are instructed to call local first responders.¹⁷ ADEQ states it “has coordinated efforts with local first responders to provide 24 hour a day seven day a week emergency response.”¹⁸ Additionally, at the time of the complaints made in July 2003, ADEQ asserts that the Air Quality Division had two Spanish speaking employees who were trained for complaint receipt.¹⁹

Complainants specifically asserted that the hotline provides no way to leave a message or complaint about problems at the facility during evenings, weekends, or holidays; however, ADEQ states that it “implemented changes to its complaint hotline as of December 2002 to ensure that the agency is effectively reaching the widest possible number of Arizona residents. Specifically, ADEQ has a Limited English Proficiency phone system for Spanish speakers.”²⁰ ADEQ states its “activities are nondiscriminatory because its complaint system provides Spanish speakers the exact same opportunities and methods for filing pollution complaints as are available to English speakers.”²¹ Finally, ADEQ states, “[t]his system, based upon programmed prompting and available in both English and Spanish, directs calls to the appropriate ADEQ staff and, after working hours, their respective voice mail boxes” ... and “is operational continuously, twenty-four hours a day, seven days a week, and three hundred sixty-five days a year.”²²

Lastly, ADEQ states that its “mission is to protect public health and the environment for all Arizonans. ADEQ carries out that mission without regard to race or other discriminatory factors. Concerning ADEQ’s ... phone system based complaint system specifically, the complaint system[] [is] not ... facially discriminatory, ... to any group, including those with Limited English Proficiency because the complaint system is publicly available for all via the phone book, [or] dial-in (e.g. 411) directory services...”²³

III. FINDINGS OF FACT

1. The ASARCO Hayden Plant Site is located 100 miles southeast of Phoenix and 50 miles northeast of Tucson. The site consists of the towns of Hayden and Winkelman, and nearby industrial areas including the ASARCO smelter, concentrator, former Kennecott smelter and all

¹⁶ Letter with Attachments from Edward M. Ranger, Administrative Counsel, Arizona Department of Environmental Quality (ADEQ) to Karen D. Higginbotham, Director, US EPA OCR (December 23, 2005) (on file with US EPA OCR).

¹⁷ Parke Letter, *supra* note 14 at 5.

¹⁸ Ranger Letter, *supra* note 16 at 5.

¹⁹ Parke Letter, *supra* note 14.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 6.

²³ Parke Letter, *supra* note 14 at 5.

associated tailings facilities. The ASARCO Hayden smelter began operations to process ore in 1912.²⁴

2. In 2000, ADEQ implemented a policy entitled; “Intake Procedures for Taking Complaints Alleging Violations of Rule or Statute” that includes the boilerplate “Complaint Receipt Form” (added in 2002) for ADEQ qualified staff to log in alleged environmental violations.²⁵

3. In December 2001, and January 2002, a Latino Hayden resident and DWAZ member attempted to contact ADEQ to report excessive smoke and emissions, but was either unable to reach any staff or unable to reach a qualified staff member to handle her complaint.²⁶

4. On December 8, 2001, and January 23, 2002, another Latino resident of Hayden called the ADEQ hotline to lodge an environmental complaint about acid mist/flakes originating from the ASARCO facility. On January 28, 2002, ADEQ representatives responded to that complaint by conducting an inspection of the resident’s home and the ASARCO facility.²⁷

5. On February 1, 2002, the Latino Hayden resident and DWAZ member referenced in Finding of Fact #3, again, called the ADEQ hotline to lodge an unspecified environmental complaint. On February 4, 2002, an ADEQ representative called and left a message for the resident in response to her complaint.²⁸

6. In the summer of 2002, ADEQ upgraded its complaint hotline for all residents of Arizona to file environmental complaints. The new “auto-attendant” hotline is based upon programmed prompting and available in both English and Spanish, directs calls to the appropriate ADEQ staff and, after working hours, their respective voice mail boxes and operates continuously 24 hours per day, 365 days per year.²⁹

7. In October 2002, ADEQ (Air Quality Division) had two employees volunteer to serve as liaisons to the Spanish-speaking community and to check the ADEQ Spanish language voice-mail system every work day by 3:30pm.³⁰

8. ADEQ conducted 41 inspections of the ASARCO facility from 2000 – 2005, including announced and unannounced inspections, which resulted in nine enforcement actions.³¹

²⁴ US EPA Region 9 Internet Page, (<http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/7508188dd3c99a2a8825742600743735/3940634a9aec311e88257478006736ce!OpenDocument#descr>) (retrieved March 10, 2011).

²⁵ ADEQ Compliance & Enforcement Handbook, Chapter 2 (Version 12/1/03).

²⁶ Administrative Complaint from Stephen Brittle, President, DWAZ to USEPA OCR (January 28, 2002).

²⁷ Parke Letter, *supra* note 14 at Attachment 6a (ADEQ Field Activity Report).

²⁸ Parke Letter, *supra* note 14 at Attachment 5 (ADEQ Complaint /Response Listing) at 1, 2.

²⁹ Ranger Letter, *supra* note 16 at 3, 4.

³⁰ Parke Letter, *supra* note 14 at Attachment 3 at 6, (Oct 17, 2002, Memo “Spanish voice-mail box” from Ira Domskey, Deputy Assistant Director, ADEQ to ADEQ staff volunteers) (on file with EPA OCR).

³¹ Ranger Letter, *supra* note 16 at Appendix A (ADEQ Inspection Table).

9. On July 17, 2003, a Hayden resident attempted, unsuccessfully, to contact an ADEQ representative to report a suspected Carbon Monoxide emission exceedance.³²
10. On August 18, 2003, an ADEQ representative contacted a Hayden resident in response to her complaint about the July 28, 2003 ASARCO fire. Also discussed was the July 17, 2003 suspected Carbon Monoxide NAAQS [National Ambient Air Quality Standards] exceedance.³³
11. As of 2002 through present, ADEQ has had Spanish-speaking employees checking the Spanish voice message system.³⁴
12. During 2002-2003, complaints filed by the public with ADEQ were either logged in by hand or electronic spread sheet by each division. During this time the ADEQ Air Quality Division complaint databases were in transition from the AZAir to the cross-media AZUrite. As such, much of ADEQ's information has been lost. Therefore, ADEQ was unable to locate specific information OCR requested pertaining to the dates asserted by DWAZ as examples of intentional discrimination (July 8 and 13, 2003).³⁵
13. The OCR Title VI team called the ADEQ English and Spanish telephone hotline during and after business hours and were able to successfully reach the recorded prompts to an ADEQ staff voice mail box.
14. As of May 2007, ADEQ can receive citizen complaints online.³⁶
15. In 2007 ADEQ placed a performance measure on itself to respond to 90% of all complaints within 5 working days of receipt. Response to a complaint at a minimum consists of contact with the complainant (when the complainant supplies contact information), contact with the facility, or referral to another agency.³⁷
16. ADEQ has had a total of 4,324 complaints submitted through phone, mail, internet, or in person since the database was established in December of 2005 up to August 2010. ADEQ performed over 1,042 inspections based on those complaints and issued over 369 informal violation notices.³⁸

³² Brittle Letter (7/23/03), *supra* note 10 at 2.

³³ *Id.* at 1 (ADEQ internal email).

³⁴ Parke Letter, *supra* note 14 at Attachment 7c at 4.

³⁵ Parke Letter, *supra* note 14 at 2.

³⁶ Parke Letter, *supra* note 14 at Attachment 9.

³⁷ *Id.*

³⁸ *Id.*

17. As of August 5, 2010, there were 12 Spanish speaking employees specifically assigned for complaint receipt through the Spanish language auto-attendant system. Other Spanish speaking employees work in other departments and also provide assistance.³⁹

18. All ADEQ inspection, compliance, and enforcement staff, regardless of multilingual facility, are trained for complaint receipt and entry.⁴⁰

19. ADEQ identified two Spanish speaking employees in the ADEQ Air Quality Division that were trained for complaint receipt at the time of the July 2003 complaints. There was also one or more Spanish speaking employees in every other division of ADEQ during July 2003.⁴¹

IV. METHODOLOGY OF THE INVESTIGATION

Because both complaints were filed by the same group on behalf of the same community and concern the same facility, the two complaints (02R-02-R9, 03R-03-R9) were consolidated into a single investigation. EPA conducted its investigation in accordance with the U.S. Department of Justice (DOJ) Investigation Procedures Manual.⁴² Specifically, the investigation included gathering and reviewing all information submitted by the Complainants and Recipient relevant to the complaint. This included the two administrative complaints filed by DWAZ on January 28, 2002, and July 21, 2003, and also rebuttal information submitted by ADEQ on December 23, 2005, and August 5, 2010, respectively. OCR began its analysis by determining whether ADEQ intentionally discriminated against the Latino residents of Hayden and Winkelman by failing to provide an effective complaint mechanism for Latinos living in Hayden and Winkelman, Arizona, to report noncompliance of alleged Title V air permit violations at the ASARCO-Hayden smelter, even after ADEQ had notice that its complaint mechanism of the telephone hotline was inadequate. OCR then analyzed whether ADEQ's action caused a disparate impact on the Latino residents of Hayden and Winkelman.

V. LEGAL FRAMEWORK AND ANALYSIS

A. Statutory Background

Title VI of the Civil Rights Act of 1964, as amended (Title VI) prohibits discrimination based on race, color, or national origin under any program or activity⁴³ receiving Federal financial assistance.⁴⁴ Under Section 601 of Title VI,

³⁹ Parke Letter, *supra* note 14 at Attachment 8.

⁴⁰ Parke Letter, *supra* note 14 at 4.

⁴¹ Parke Letter, *supra* note 14 at Attachment 3.

⁴² See Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes. (September 1998).

⁴³ The Civil Rights Restoration Act of 1987 broadly defines "program or activity" to include all of the operations of an entity, any part of which receives federal assistance. 42 U.S.C. § 2000d-4a.

⁴⁴ 42 U.S.C. §§ 2000d to 2000d-7.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁴⁵

B. Regulatory Background – Intentional Discrimination

EPA's Title VI implementing regulations prohibit intentional discrimination:

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin⁴⁶

In addition, EPA regulations specifically provide that recipients shall not “[d]eny a person any service, aid or other benefit of the program,”⁴⁷ “[p]rovide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program,”⁴⁸ or “[r]estrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program.”⁴⁹

In order to prove intentional discrimination, the investigation must reveal that “a challenged action was motivated by the intent to discriminate.”⁵⁰ The investigation would have to show that the decision maker was aware of the complainant's race, color, or national origin, and that the recipient acted, at least in part, because of the complainant's race, color, or national origin.⁵¹

Where direct proof of discriminatory motive is unavailable, it is necessary to evaluate whether any circumstantial evidence of discriminatory intent exists. Such evidence may be found in various sources including statements by decision-makers, the historical background of the events at issue, the sequence of events leading to the decision at issue, a departure from standard procedures, the minutes of meetings, a past history of discriminatory conduct, and evidence of a substantial disparate impact on a protected group.⁵²

In addition, claims of intentional discrimination may be analyzed using the Title VII burden-shifting analytic framework established by the Supreme Court in *McDonnell Douglas*

⁴⁵ 42 U.S.C. § 2000d.

⁴⁶ 40 C.F.R. § 7.30.

⁴⁷ 40 C.F.R. § 7.35(a)(1).

⁴⁸ 40 C.F.R. § 7.35(a)(2).

⁴⁹ 40 C.F.R. § 7.35(a)(3).

⁵⁰ *Elston v. Talladega County Bd. of Education*, 997 F.2d 1394, 1406 (11th Cir. 1993).

⁵¹ *Id.*

⁵² *Arlington Heights v. Metropolitan Hous. Redevelopment Corp.*, 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment).

Corp. v. Green.⁵³ The elements of a *prima facie* case may vary depending on the facts of the complaint, but such elements often include the following:

1. The aggrieved person or group belonged to a protected class;
2. This person applied for, and was eligible for, a benefit provided by a federally assisted program;
3. Despite the group's or person's eligibility for the benefit, the group or person was denied or failed to receive the benefit; and,
4. The recipient provided the benefit to other similarly situated individuals, or other circumstances that support an inference of discrimination.⁵⁴

If a *prima facie* case can be established, the burden shifts to the recipient to provide a justification or "establish[] that the same decision would have resulted even had the impermissible purpose not been considered."⁵⁵ If the recipient can make such a showing, the inquiry shifts back to EPA to determine whether the justification proffered by the recipient is actually a pretext for discrimination.⁵⁶ While the *McDonnell Douglas* analysis concerns the burden of producing evidence, for purposes of this administrative investigation, the ultimate burden of proof remains with EPA.⁵⁷

Analysis

OCR began its analysis by determining whether ADEQ intentionally discriminated against the Latino residents of Hayden and Winkelman by failing to provide an effective complaint mechanism for Latinos living in Hayden and Winkelman, Arizona, to report noncompliance of alleged Title V air permit violations at the ASARCO-Hayden smelter, even after ADEQ had notice that its complaint mechanism of the telephone hotline was inadequate. DWAZ alleges that ADEQ's telephone hotline had been ineffective as a method for Latinos in Hayden and Winkelman to report concerns about the ASARCO-Hayden copper smelter.

To analyze the claims of intentional discrimination, the OCR utilized the Title VII burden-shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green* as described above. Establishing a *prima facie* case for intentional discrimination:

⁵³ 411 U.S. 792 (1973); see also *Baldwin v. Univ. of Texas Med. Branch at Galveston*, 945 F. Supp. 1022, 1031 (S.D.Tex. 1996); *Brantley v. Independent Sch. Dist. No. 625, St. Paul Public Schools*, 936 F. Supp. 649, 658 n.17 (D.Minn. 1996).

⁵⁴ *McDonnell Douglas*, 411 U.S. at 802; *Bass v. Board of Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1104 (11th Cir. 2001) (describing elements of *prima facie* case under Title VII), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-254, n. 6, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

⁵⁵ *Burdine*, 450 U.S. at 271, n.21; *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

⁵⁶ *Burdine*, 450 U.S. at 802. See generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁵⁷ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (notwithstanding *McDonnell Douglas*'s burden shifting analysis, the burden of proof remains with the plaintiff).

1. Protected Class

DWAZ filed the complaint on behalf of Latino residents of Hayden and Winkelman. Latinos are members of a protected class by virtue of their national origin.

2. Eligibility for a benefit provided by a federally assisted program

In this case, the “provided benefit” is the ADEQ telephone hotline environmental complaint mechanism. The resident-complainants of Hayden and Winkelman, as residents of the State of Arizona, were eligible for the benefits of the state-wide telephone complaint hotline. ADEQ was, and still is, a recipient of EPA financial assistance.

3. Denial or failure to receive benefits

As mentioned above, the benefit provided by ADEQ of the phone hotline was an effective complaint mechanism. DWAZ alleges that ADEQ failed to provide a reliable complaint mechanism to report alleged air pollution violations at the ASARCO-Hayden copper smelter in Hayden.⁵⁸ DWAZ asserts several incidents in December 2001, January 2002 and July 2003, in which Hayden residents (DWAZ members) called the ADEQ hotline about excessive smoke and emissions, sulfuric mist emissions, excessive dust, and carbon monoxide exceedance, respectively at the ASARCO facility, and that the complainants were unable to reach anyone and/or reach anyone qualified to take the call.⁵⁹

ADEQ was not able to provide an explanation related to the incidents in December 2001 and January 2002 related by the DWAZ members. However, the evidence also shows that on January 28, 2002, ADEQ representatives responded to an environmental complaint lodged by another Latino Hayden resident through the ADEQ hotline by conducting an inspection of the resident’s home and the ASARCO facility.⁶⁰ In addition, the evidence shows that on February 4, 2002, an ADEQ representative called and left a message for a Latino Hayden resident and complainant in response to her February 1, 2002, complaint called into the ADEQ hotline.⁶¹

ADEQ was not able to provide an explanation relating to the two incidents in July 2003 in which the complainants asserted that a resident-complainant tried to call the ADEQ hotline and was unable to reach qualified staff in which to take the call. Instead, ADEQ responded that during 2002-2003, complaints filed with ADEQ were either logged in by hand or electronic spreadsheet by each division. During this time the ADEQ Air Quality Division was in transition from the AZAir database to the cross-media AZUrite database. As such, ADEQ has been unable to locate information pertaining to the incidents in July 2003.⁶²

⁵⁸ US EPA OCR, *supra* note 16 at 1.

⁵⁹ Brittle Letters, *supra* note 5.

⁶⁰ Parke Letter, *supra* note 14 at Attachment 6a.

⁶¹ Parke Letter, *supra* note 14.

⁶² Parke Letter, *supra* note 14 at 2.

However, in 2002, ADEQ upgraded its complaint hotline for all residents of Arizona to file environmental complaints. The “auto-attendant” hotline is based upon programmed prompting and available in both English and Spanish, directs calls to the appropriate ADEQ staff and, after working hours, their respective voice mail boxes and operates continuously 24 hours per day, 365 days per year.⁶³ Additionally, in October 2002, ADEQ’s Air Quality Division had two employees volunteer to serve as liaisons to the Spanish-speaking community and volunteer to check the ADEQ Spanish language voice-mail system.⁶⁴ And since 2002, ADEQ has had Spanish-speaking employees checking the Spanish voice message system.⁶⁵ Beginning in May 2007, ADEQ also began receiving complaints online.⁶⁶

Accordingly, OCR finds that the evidence in the record is insufficient to conclude that the complainants were denied the benefit of an effective complaint mechanism, specifically for the phone hotline. While the record does indicate that ADEQ did receive and respond to some complaints from 2001 to 2002, including a DWAZ member complaint, OCR is unable to determine what took place related to other DWAZ complaints in 2001 and 2002 and DWAZ’s 2003 complaints. Thus, while the record shows that DWAZ alleges that specific environmental complaints filed by certain Hayden Latino residents were not adequately addressed by ADEQ, which OCR was unable to confirm, other similar environmental complaints filed by other Hayden Latino residents during the same time period were addressed by ADEQ. Furthermore, OCR does note that the record indicates that for incidents from 2000 through 2005, 41 inspections were conducted at the ASARCO Hayden mill or smelter sites.⁶⁷

Therefore, based upon the investigation, and the considerable improvements that ADEQ has made to their complaint mechanism, there is insufficient evidence to conclude that Complainant-resident’s were denied the benefits of, or participation in, a federally assisted program, specifically regarding the phone hotline.

4. Whether ADEQ provided the benefit differently to other similarly situated individuals or otherwise denied DWAZ the benefit because of race, color, or national origin.

Contrary to the Complainant’s assertion, the investigation did not reveal that the benefit of the environmental complaint mechanism (telephone complaint hotline) was provided differently for members outside the Complainant-residents’ protected class. ADEQ provided the same state-wide toll-free phone number for all Arizonians to report non-emergencies during business hours, evenings, weekends and holidays.⁶⁸ If qualified ADEQ personnel were not present to receive calls on the days in January 2002 and July 2003, as alleged by the

⁶³ Ranger Letter, *supra* note 16 at 3, 4.

⁶⁴ Parke Letter, *supra* note 14 at Attachment 3 at 6.

⁶⁵ Parke Letter, *supra* note 14 at Attachment 7c at 4.

⁶⁶ Parke Letter, *supra* note 14 at Attachment 9.

⁶⁷ Ranger Letter, *supra* note 16 at Appendix A.

⁶⁸ Ranger Letter, *supra* note 16 at 3, 6.

complainants,⁶⁹ then it would also be true that any other Arizonan calling the hotline the same day would have also experienced the same frustration. Therefore, the access to the ADEQ complaint hotline was provided in a comparable manner to all Arizonans and would not have resulted in persons outside the Complainants' protected class receiving a service differently than the Complainants.

As the third and fourth elements of the *prima facie* case for intentional discrimination have not been met, OCR finds that the Complainant's *prima facie* case for intentional discrimination has not been established. While the *prima facie* elements are not rigid and are merely intended to provide a framework for establishing discrimination, the investigative record does not reveal other indicia of discriminatory intent. The record does not demonstrate that ADEQ was motivated by the Complainants' race and or/national origin in the provided access to the telephonic complaint hotline. Therefore, the Complainant's allegations regarding ADEQ's intentional discrimination are dismissed. As discussed above, Latino residents of Arizona had the same access to ADEQ's complaint mechanism as all other residents of Arizona. As OCR finds that there is insufficient evidence to support complaints allegations of intentional discrimination, there is similarly insufficient evidence to support complainants second allegation that the alleged intentional discrimination resulted in discriminatory effects on Latino residents in Hayden and Winkelman, AZ.

C. Regulatory Background – Discriminatory Effects

The complainants' second allegation is that ADEQ's failure to provide an effective complaint mechanism in the telephone hotline has resulted in discriminatory effects on Latino residents in Hayden and Winkelman.⁷⁰ DWAZ alleges that Hayden and Winkelman are 90% Latino, and the discriminatory effects complained of include air pollution and adverse health consequences associated with smoke and particulate matter emitted from the nearby ASARCO-Hayden smelter.⁷¹

In this case, the permit for the ASARCO plant itself is not at issue – the “provided benefit” is the ADEQ telephone hotline environmental complaint mechanism. The resident-complainants of Hayden and Winkelman, as residents of the State of Arizona, were eligible for the benefits of the state-wide telephone complaint hotline. ADEQ was, and still is, a recipient of EPA financial assistance.

⁶⁹ Brittle Letters, *supra* note 5.

⁷⁰ Acceptance of Administrative Complaint from United States Environmental Protection Agency, Office of Civil Rights (USEPA OCR) to Stephen Brittle, President, Don't Waste Arizona (DWAZ) (August 20, 2002).

⁷¹ *Id.*

Analysis

1. Facially Neutral Procedures/Practices

The record reveals, as noted in Facts 6, 7, 11, 13 and 14 above, in the summer of 2002, ADEQ upgraded its complaint hotline for all residents of Arizona to file environmental complaints. The new “auto-attendant” hotline is based upon programmed prompting and available in both English and Spanish, directs calls to the appropriate ADEQ staff and, after working hours, their respective voice mail boxes and operates continuously 24 hours per day, 365 days per year.⁷² In October 2002, ADEQ (Air Quality Division) had two employees volunteer to serve as liaisons to the Spanish-speaking community and to check the ADEQ Spanish language voice-mail system every work day by 3:30pm.⁷³ As of 2002 through present, ADEQ has had Spanish-speaking employees checking the Spanish voice message system.⁷⁴ Members of the OCR Title VI team have called the ADEQ English and Spanish telephone hotline during and after business hours and were able to successfully reach the recorded prompts to an ADEQ staff voice mail box. As of May 2007, ADEQ can receive citizen complaints online.⁷⁵

2. Impact on Protected Group at Issue

DWAZ filed the complaint on behalf of Latino residents of Hayden and Winkelman. Latinos are members of a protected class by virtue of their national origin. DWAZ alleges that ADEQ’s failure to provide an effective complaint mechanism in the phone hotline or rectify the alleged problems has resulted in discriminatory effects on Latino residents in Hayden and Winkelman. The discriminatory effects complained of include air pollution and adverse health consequences associated with smoke and particulate matter emitted from the nearby ASARCO-Hayden smelter.⁷⁶

DWAZ asserts several incidents in December 2001, January 2002 and July 2003, in which Hayden residents (DWAZ members) called the ADEQ hotline about excessive smoke and emissions, sulfuric mist emissions, excessive dust, and carbon monoxide exceedance, respectively at the ASARCO facility, and that the complainants were unable to reach anyone and/or reach anyone qualified to take the call.⁷⁷ The record notes that ADEQ was not able to provide an explanation related to the incidents in December 2001 and January 2002 related by the DWAZ members. However, the evidence also shows that on January 28, 2002, ADEQ representatives responded to an environmental complaint lodged by another Latino Hayden

⁷² Ranger Letter, *supra* note 16 at 3, 4.

⁷³ Parke Letter, *supra* note 14 at Attachment 3 at 6, (Oct 17, 2002, Memo “Spanish voice-mail box” from Ira Domskey, Deputy Assistant Director, ADEQ to ADEQ staff volunteers) (on file with EPA OCR).

⁷⁴ Parke Letter, *supra* note 14 at Attachment 7c at 4.

⁷⁵ Parke Letter, *supra* note 14 at Attachment 9.

⁷⁶ Complaint Letter (Jan. 2002), *supra* note 8.

⁷⁷ Brittle Letters, *supra* note 5.

resident through the ADEQ hotline by conducting an inspection of the resident's home and the ASARCO facility.⁷⁸

In addition, the record reveals that on February 4, 2002, an ADEQ representative called and left a message for a Latino Hayden resident and complainant in response to her February 1, 2002, complaint called into the ADEQ hotline.⁷⁹ ADEQ was not able to provide an explanation relating to the two incidents in July 2003 in which the complainants asserted that a resident-complainant tried to call the ADEQ hotline and was unable to reach qualified staff in which to take the call. Instead, ADEQ responded that during 2002-2003, complaints filed with ADEQ were either logged in by hand or electronic spreadsheet by each division. During this time the ADEQ Air Quality Division was in transition from the AZAir database to the cross-media AZUrite database. As such, ADEQ has been unable to locate information pertaining to the incidents in July 2003.⁸⁰ Fact 8 above states that ADEQ conducted 41 inspections of the ASARCO facility from 2000 – 2005, including announced and unannounced inspections, which resulted in nine enforcement actions.⁸¹ Fact 19 above states that there were two Spanish speaking employees in the ADEQ Air Quality Division that were trained for complaint receipt at the time of the July 2003 complaints, and also one or more Spanish speaking employees in every other division of ADEQ during July 2003.⁸²

ADEQ provided the same state-wide toll-free phone number for all Arizonans to report non-emergencies during business hours, evenings, weekends and holidays.⁸³ If qualified ADEQ personnel were not present to receive calls on the days in January 2002 and July 2003, as alleged by the complainants,⁸⁴ then it would also be true that any other non-Latino Arizonan from Hayden or Winkelman calling the hotline the same days would have also experienced the same frustration, as would a caller from anywhere else in Arizona. Therefore, not only was the access to the ADEQ complaint hotline on the days in question in January 2002 and July 2003 provided in a comparable manner to all Arizonans, it would have resulted in the same impact to persons outside the Complainants' protected class in the locations at issue in the complaint.

Overall, the evidence shows that Latino residents of Arizona have the same access to ADEQ's complaint mechanism as all other residents of Arizona, and that there have not been discriminatory effects. As previously stated, the telephone complaint system is equally accessible for all residents statewide. Therefore, based upon the investigation, and the considerable improvements that ADEQ has made to their telephone hotline complaint mechanism, OCR finds that there is insufficient evidence to support Complainants' second allegation that the alleged intentional discrimination resulted in discriminatory effects on Latino residents in Hayden and Winkelman, AZ.

⁷⁸ Parke Letter, *supra* note 14 at Attachment 6a.

⁷⁹ Parke Letter, *supra* note 14.

⁸⁰ Parke Letter, *supra* note 14 at 2.

⁸¹ Ranger Letter, *supra* note 16 at Appendix A (ADEQ Inspection Table).

⁸² Parke Letter, *supra* note 14 at Attachment 3.

⁸³ Ranger Letter, *supra* note 16 at 3, 6.

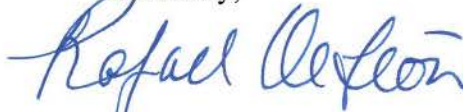
⁸⁴ Brittle Letters, *supra* note 5.

VI. CONCLUSION

Based on the facts established during this investigation and the applicable legal standards, OCR concludes that both the Complainants' allegations of unlawful intentional discrimination and discriminatory effects, are not supported by the record. Thus, OCR finds no violation of EPA's regulations implementing Title VI, and hereby dismisses DWAZ's complaint of intentional discrimination and discriminatory effects against ADEQ, pursuant to 40 C.F.R. § 7.120(g).

If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights by telephone at 202-564-0792, by email at Wooden-Aguilar.Helena@epa.gov or by mail at U.S. EPA, 1200 Pennsylvania Ave., N.W., Mail Code 1201A, Washington, D.C., 20460.

Sincerely,

A handwritten signature in blue ink that reads "Rafael DeLeón". The signature is fluid and cursive, with the first name "Rafael" and last name "DeLeón" clearly distinguishable.

Rafael DeLeón
Director

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